SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 918

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al., Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al., Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, International Brotherhood of Electrical Workers, AFL-CIO, International Association of Machinists, AFL-CIO, Sheet Metal Workers International Association, AFL-CIO, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Transportation-Communication Employees Union,[1] System Division

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[1] This organization is identified throughout the proceedings below as "The Order of Railroad Telegraphers." Its name was changed to "Transportation-Communication Employees Union" on May 1, 1965 with no change in its structure, membership or jurisdiction. For convenience of reference to the proceedings below, we refer to this organization in this petition as "Telegraphers."

No. 87, and Brotherhood of Maintenance of Way Employes, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on July 16, 1965 enforcing an order of the National Labor Relations Board (hereinafter referred to as the "NLRB").

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals and the dissenting opinion of Chief Judge Bazelon (App. A, *infra*, pp. 1a-4a) are reported at 350 F. 2d 791. The findings of fact, conclusions of law, and the order of the National Labor Relations Board, and the dissenting opinion of Member Jenkins (R. 2-22)[2] are reported at 150 NLRB No. 37.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 4a) was entered on July 16, 1965. Within the prescribed time, a petition for rehearing *en banc* was filed with the court below. On October 7, 1965, the petition was denied (App. C, *infra*, p. 5a). By order dated December 28, 1965, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including January 17, 1966. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 and Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*), hereinafter referred to as "NLRA".

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[2] "R" references are to the Joint Appendix filed in the court below.

QUESTIONS PRESENTED

1. In a dispute between a railroad and its employees which is subject solely to the provisions of the Railway Labor Act and not subject to the provisions of the NLRA, may the NLRB prohibit the railroad employees from engaging in conduct in connection with such dispute, which conduct is lawful under the Railway Labor Act but unlawful under the NLRA, on the sole ground that their unions, only through their international organizations, represent other persons not involved in the dispute who are "employees" within the meaning of the NLRA because employed in non-railroad industry?

2. Do unions which represent railroad employees exclusively suffer a diminution of their rights in the conduct of a strike against a railroad by joining with other railroad unions who have the same dispute but whose Internationals have non-railroad members?

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act, as amended, 45 U.S.C. Section 151, *et seq.*, are set forth in Appendix D, p. 6a, *infra.*

The relevant provisions of the NLRA are as follows:

> Sec. 2. When used in this Act—
>
> (2) The term *"employer"* . . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time, . . ."
>
> (3) The term *"employee"* shall . . . not include . . . any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, . . .
>
> (5) The term *"labor organization"* means any organization of any kind, or any agency or em-

ployee representation committee or plan, in which *employees* participate and which exists for the purpose, in whole or in part, of dealing with *employers* concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Sec. 8 (b) It shall be an unfair labor practice for a *labor organization* or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

STATEMENT

This proceeding arises from a collective bargaining conflict between the Florida East Coast Railway (hereinafter referred to as the "FEC"), a common carrier subject to the Railway Labor Act, and eleven unions

each of which, pursuant to the provisions of the Railway Labor Act, is a bargaining representative of a craft or class of non-operating employees employed by the FEC (R. 28-30).[3]

In August of 1961, the Eleven Cooperating Railway Labor Organizations determined to initiate a national effort to improve the rates of pay of non-operating railway employees and to require the carriers to provide six months advance notice of reduction in work force. Pursuant to this determination appropriate notices, as required by Section 6 of the Railway Labor Act, were served by each of the eleven unions upon the nation's railway carriers including the FEC (R. 30-31). Ultimately, the basic wage and work rule movement was settled with virtually all of the nation's Class I railroads through mutual acceptance on June 5, 1962, of the recommendations of Presidential Emergency Board No. 145. (45 U.S.C. § 160).

The FEC, however, although it had theretofore been represented by the Southeastern Carriers' Conference Committee in the national handling of earlier cases, declined to participate in national handling in this instance and refused to accede to the Emergency Board's proposed resolution of the issues. The specific dispute thus remaining unsettled on the FEC was then mediated by the National Mediation Board under Section 5 of the Railway Labor Act from the latter

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[3] The eleven unions, self-designated as the Eleven Cooperating Railway Labor Organizations, include the petitioners, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; the Brotherhood of Railroad Signalmen; the Hotel and Restaurant Employees' and Bartenders International Union; the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; and the Brotherhood Railway Carmen of America (R. 30).

part of July to the forepart of December 1962, when the Mediation Board concluded that its efforts were unsuccessful and terminated its services (R. 33-35). On January 23, 1963, the Eleven Cooperating Railway Labor Organizations and each of the constituent unions struck the FEC and began picketing along its property from Jacksonville to Miami, Florida. From November 9, 1963 to December 23, 1963 the specific dispute on the FEC was the subject of investigation and report by Presidential Emergency Board No. 157 (R. 39). It is not shown in the record here but the fact is that the Recommendations of the Emergency Board were accepted by the unions and rejected by the FEC.

Approximately five days before the strike started, the FEC and the National Aeronautics and Space Administration entered into a contract pursuant to which the FEC agreed to design, construct, operate, and maintain a spur line from the FEC mainline to points on and near Merritt Island Launch Area and Cape Kennedy, Florida. The FEC began construction of the spur in July of 1963. On September 11 and 12, 1963, the Telegraphers established pickets at and near Merritt Island Launch Area, and on February 10 and 11, 1964, it picketed various points at both Merritt Island and Cape Kennedy. In June of 1964, picketing at Cape Kennedy and Merritt Island Launch Area was resumed for two days by the Brotherhood of Maintenance of Way Employes (hereinafter referred to as the "BMWE").

The National Labor Relations Board's processes were invoked by the filing of charges alleging violation of Section 8 (b) (4) (B) of the NLRA and in both February and June of 1964, the United States District Court for the Middle District of Florida entered

temporary injunctions restraining the Telegraphers and the BMWE from picketing Merritt Island Launch Area and Cape Kennedy upon the application of the NLRB for such relief under Section 10 (l) of the NLRA (R. 62, 66).

The theory upon which the Board's General Counsel proceeded under Section 10 (l) of the NLRA to enjoin the picketing was ultimately adopted by the Board upon its consideration of the case (R. 10-16).[4] The NLRB concluded that the Eleven Cooperating Railway Labor Organizations were engaged in a joint venture toward the accomplishment of a common collective bargaining objective. It held that each of the joint venturers was "responsible for the conduct of other members of the joint venture and of agents of each other in pursuit of the common aim" (R. 15) and, hence, the Telegraphers and the BMWE "were acting in behalf of all striking unions" (*ibid*). The NLRB, however, acknowledging that the Telegraphers and the BMWE are not "labor organizations" accountable for conduct violative of Section 8 (b)(4) of the NLRA, selected only the other four petitioners herein (hereinafter referred to as the "Internationals") from among the eleven disputing unions and attached to them, as principals responsible for the picketing, the status of "labor organizations" within Section 2(5) of the NLRA (R. 16). To achieve this result, the NLRB looked only to the fact that the Internationals, whose railway employee members number among the shopcraft employees employed by the FEC, also admit

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[4] This matter was presented to and considered by the Board upon a stipulation of facts without the customary hearing before and report of a Trial Examiner (R. 26). Accordingly, there are no contested factual issues.

to membership "employees" within the Section 2(3) definition.[5] NLRB Member Jenkins dissented from the majority on the grounds that the dispute and attendant picketing were governed exclusively by the Railway Labor Act, the scheme of the NLRA requires uniform applicability of its several provisions, and the rationale adopted by the Board in *Masters, Mates and Pilots,* 125 NLRB 113 (any "employee" participation creates a "labor organization"), when extended to cover this case, constitutes the Board a "roving commission" to remedy conduct beyond its grant of jurisdictional power (R. 20-22).

The court below, without comment upon the contested threshold question of whether the Internationals could properly be deemed "labor organizations" in the factual make-up of this case, rested enforcement of the NLRB's order upon the authority of its decision in *International Organization of Masters, Mates and Pilots of America, Inc.* v. *N.L.R.B.,* 351 F. 2d 771. Chief Judge Bazelon dissented from the *per curiam* decision, distinguishing the *Masters, Mates and Pilots* case by pointing out that in that case no "congressional allocation of regulatory responsibility" was involved and that here the record would not sustain a finding that the Internationals acted as principals of the Telegraphers and the BMWE since there was no

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[5] Employees within the "shopcraft" classifications are represented in collective bargaining by six unions, *i.e.* the four petitioning Internationals, the Brotherhood Railway Carmen of America, and the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (R. 39-40). Together, these unions constitute and are affiliated with the Railway Employes' Department, AFL-CIO (R. 39-45), and on the FEC property, they comprise System Federation No. 69 (R. 46-47).

showing that they had dominant control over the activities of the Eleven Cooperating Railway Labor Organizations (*infra*, pp. 1a-4a).

REASONS FOR GRANTING THE WRIT

1. This case presents questions of substantial importance in the administration of the NLRA and the Railway Labor Act. The holding of the court below, approving the NLRB's application of Section 8 (b) (4) (B) of the NLRA to conduct occurring in the course of a collective bargaining dispute wholly within the purview of the Railway Labor Act, is both erroneous and in defiance of the "natural construction which the text, the legislative setting and the function of the statute command * * *." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 186. The NLRA was designed "to operate as a coherent whole" (*Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.,* 370 U.S. 173, 181), and a union which is a "labor organization" subject to the prohibitions of Section 8 (b) (4) must be amenable to all the proscribing aspects of Section 8 (b) and at one and the same time, within a constant factual framework, capable of achieving the benefits of Sections 8 (a) and (9). This precise view was expressed by the NLRB in *Di Giorgio Fruit Corp.,* 87 NLRB No. 125. However, in the instant circumstances it is plain from the definitional impediments created by the exclusion from the NLRA of employers and employees subject to the Railway Labor Act, as set forth in Section 2 (2) and 2 (3), that the NLRA cannot be given a comprehensive and uniform effect. Indeed, the anomalous construction is so severe in its result that the Section 2 (2) and 2 (3) definitions immunize the Internationals from liability for secondary conduct prohibited by sub-sections (A),

(C) and (D) of Section 8 (b)(4). Nothing in either the legislative history or the purpose of the NLRA suggests that one of its provisions can be dissected out and isolated from the whole. The court below now ignores the fragmentizing construction given the NLRA by the NLRB, a result it has heretofore carefully avoided. *Di Giorgio Fruit Corp.* v. *National Labor Relations Board,* 191 F. 2d 642 (C.A., D.C.), *certiorari denied,* 342 U.S. 869.

Moreover, Congress, in recognition of the pre-existing Railway Labor Act, devised the pertinent statutory definitions of the NLRA for the express purpose of delimiting the NLRA's scope and thus preventing NLRB intrusion upon the railway labor field preemptively occupied by the former statute.[6] *California* v. *Taylor,* 353 U.S. 553; *Local Union No. 25, IBT* v. *New York, N.H. & Hartford Railroad Co.,* 350 U.S. 155; *Shields* v. *Utah Idaho Cent. R. Co.,* 305 U.S. 177. In *Paper Makers Importing Co.,* 116 NLRB No. 37, the Board accurately observed "that matters affecting railroads and railroad employees' unions properly pertain to the orbit of the instrumentalities established by Congress in the Railway Labor Act." It further commented that "secondary boycott by a railroad union * * * does not violate Section 8 (b)(4)(A) even if such boycott involves inducement of employees of neutral employers subject to the Act."[7] Now, however, the

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[6] "The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees." Sen. Report No. 105, 80th Cong., 1st Sess., p. 19 (1947).

[7] Section 8 (b)(4)(A) of the 1947 Act, under which the *Paper Makers* case arose, became Section 8 (b)(4)(B) when Congress again amended the Act in 1959.

NLRB with the sanction of the court below justifies the over-riding of congressional purpose by an all too facile, mechanical reference to the Section 2 (5) phrase "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers."

The legislative history of the original NLRA shows that Congress deliberately defined the term "labor organization" broadly, but this was done "in order that the independence of action guaranteed by Section 7 of the bill and protected by Section 8 shall extend to all organizations of employees that deal with employers" including "employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of Section 8." S. Rep. No. 573 on S. 1958, 74th Congress, 1st Sess., p. 7, reprinted in 2 Legislative History of the National Labor Relations Act, 1935 (Govt. Print. Off., 1935), p. 2306. It is obvious that Congress, by the definition, sought primarily to encompass within the sweep of the NLRA the employer-dominated or supported "company unions" (*ibid* at 2309) then prevalent in the American industrial scene. See *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203. There is no indication, however, that it either intended or desired an administrative expansion of the definition, so as to reach the conduct of unions engaged in a railway labor dispute, solely because they are composed, only fortuitously, of both Section 2 (3) "employees" and the employees of a railroad, notwithstanding that Section 2 (3) employees are not involved in the dispute.

The decision of the NLRB in *International Organization of Masters, Mates and Pilots of America* (Chi-

cago Calumet Stevedoring Co., Inc.), 125 NLRB 113, modified 144 NLRB 1172 and 146 NLRB No. 19, enforced *sub nom, International Organization of Masters, Mates and Pilots* v. *National Labor Relations Board,* 351 F. 2d 771 (C.A., D.C.), even if correctly decided, provides no warrant for the assertion of jurisdiction in this matter.[8] The significant distinction between that case and the one at hand turns upon the fact that there both the primary and secondary aspects of the dispute occurred in an industrial setting wholly within the NLRB's jurisdiction. As pointed out by Chief Judge Bazelon, "that decision does not threaten interference with a congressional allocation of regulatory responsibility" for there, unlike here, "If the unions * * * were not subject to the National Labor Relations Board, they were subject to no regulation at all." (App. A, *infra,* p. 3a.) Here, however, the jurisdictionally determinative primary dispute has been withdrawn from the Board's competence and subjected to comprehensive regulation under the Railway Labor Act. The Internationals do not claim an exemption from the NLRA because of their railway employee membership. Similarly, the Internationals do not claim to be "labor organizations" within the NLRA "when it is to [their] advantage to do so and protest[s] against being so labeled when that position serves [their] end." (Mr. Justice Douglas' dissent in *Interlake, supra,* at 188) They simply seek their congressionally conferred exclusion from the NLRA

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[8] The court below misconceived the "significant question" (App. A, *infra,* pp. 1a-2a). The petitioners have never contended that a "labor organization" can avoid the restraints of Section 8 (b)(4) through the agency of unions not "labor organizations" under the NLRA.

when functioning under the mantle of the Railway Labor Act.

Historically and structually the activities of the Internationals in representing railroad employees have been differentiated from their activities in other industries. The employees they represent on the FEC belong to locals composed exclusively of railroad employees (R. 47-52). The International and district or regional officers, responsible for directing railroad activities are distinct from, and generally differently selected from, other officers responsible for activities in other industries (*ibid*). The certified collective bargaining representative through which these unions and other shopcraft unions function on the FEC is System Federation No. 69, Railway Employes' Department, AFL-CIO (R. 28-29). For over half a century these organizations and the other shop crafts have coordinated their railroad activities on a national and international basis through the Railway Employes' Department, AFL (now AFL-CIO) (R. 39-47). When functioning under the Railway Labor Act they are railway labor organizations just as distinctly as the Telegraphers or BMWE or the operating unions such as the Brotherhood of Railroad Trainmen or the Brotherhood of Locomotive Firemen and Enginemen.

In sum, prior to announcement of the decisions rendered below, it was universally understood that the boundaries marked by Congress in the relation of the NLRA and the Railway Labor Act were clear. They are now blurred. Resolution by this Court is essential not only to restore clarity to the interrelationship of the NLRA and the Railway Labor Act, but also to overcome the mistaken notion that the provisions of the NLRA can be selectively applied. Indeed, this case

dramatically emphasizes the need for the exercise of this Court's reviewing powers to correct "the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co.* v. *National Labor Relations Board,* 380 U.S. 300.

2. This Court has acknowledged the Internationals as unions under the Railway Labor Act wholly separate from a "labor organization" status under Section 2 (5) of the NLRA. When this Court in *Railway Employes' Department* v. *Hanson,* 351 U.S. 225, sustained the supremacy of the 1951 union-shop amendment to the Railway Labor Act against the contention that the Nebraska "right-to-work" law precluded its application to railway shopcraft employees represented by the Internationals as well as other railway unions, it recognized that Congress had accorded them rights when representing railroad employees that they could not exercise when functioning under the NLRA.[9]

3. There is no controversy about the fact that Telegraphers and BMWE, which alone carried on the challenged picketing, might have done everything they did and done so lawfully if they alone had been involved in the strike—or presumably if they had had the dispute in common only with other unions whose memberships are composed only of railroad employees (R. 16). The NLRB and the court below hold their conduct unlawful because the other petitioners have the same dispute that they have with the railroad and, as

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[9] Section 14(b) provides that: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a *labor organization* as a condition of employment of any State or Territory in which such execution or application is prohibited by State or Territorial law."

would certainly be expected, all the striking unions cooperated in carrying on the strike (R. 16, App. A pp. 1a-2a, *infra*).

This is not a case of railroad unions acting as instrumentalities for non-railroad unions in carrying on conduct proscribed for the latter in a dispute in a non-railroad industry. (See footnote 8, *supra.*) The Telegraphers and BMWE, as well as the other exclusively railroad unions and the other petitioners, all have their own immediate interests at stake in the strike.

This situation presents a most important question calling for resolution by this Court. Do exclusively railroad unions suffer a diminution of their rights in the conduct of a strike by cooperating with other railroad unions who have the same dispute but whose Internationals have non-railroad members?

We have been unable to conceive of any rational purpose Congress might have had in mind in prescribing such a result. Why should anyone want to make the rights of exclusively railroad unions in an exclusively railroad dispute dependent on the international characteristics of other railroad unions who have the dispute in common with them? If any such result is to be imposed it calls for some rational exposition other than the narrow verbalism indulged by the Board and sanctioned by the court below. See *Pan American World Airways* v. *Carpenters,* 324 F. 2d 217 (C.A., 9), *certiorari denied,* 376 U.S. 964.

The functional scheme of the Railway Labor Act as it governs disputes within the railroad and airline industries only begins with "the traditional instruments of mediation, conciliation and arbitration" (*General Committee* v. *M-K-T-R. R. Co.,* 320 U.S. 323,

332) and ultimately all "available economic weapons" may be invoked in an effort to force a bargaining objective (*ibid*). The Board and the court below now say the validity of that statement turn on fortuitous and irrelevant circumstances.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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January 17, 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19084

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Review, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board

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Decided July 16, 1965

Mr. Richard H. Frank for petitioners.

Mr. Warren M. Davison, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Marcel Mallet-Prevost,* Assistant General Counsel, were on the brief, for respondent.

Before BAZELON, *Chief Judge,* BURGER and TAMM, *Circuit Judges.*

PER CURIAM: The only significant question presented is whether under our recent decision in *International Organization of Masters, Mates and Pilots of America, Inc., et al.* v. *NLRB,* No. 15537, June 21, 1965, two of the peti-

tioners can be held liable as "agents" of "labor organizations" for actions which would violate the express provisions of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act if committed by "a labor organization or its agents."

Petitioners Maintenance of Way Employees and System Division No. 87, The Order of Railway Telegraphers, represent only individuals employed by employers subject to the Railway Labor Act. Such individuals are excluded from the definition of "employees" within the National Labor Relations Act. It follows that these petitioners are not themselves "labor organizations" within that statute. Under *Masters, Mates and Pilots, supra,* petitioners may nevertheless be held liable if the record discloses that petitioners acted as agents for or joint venturers with unions which do qualify as "labor organizations" within the National Labor Relations Act. We think the Board was justified in finding that the petitioners were engaged in a joint venture with statutory labor organizations, and that the secondary activity was within Section 8(b)(4) though directed ultimately at a Railway Labor Act employer.

That Petitioners Telegraphers and Maintenance of Way Employees did not violate the Railway Labor Act (which does not prohibit secondary boycotts) by their actions cannot remove them from the reach of the National Labor Relations Act. Congress' failure to deal with such activity in the Railway Labor Act at its inception or by amendment in no way detracts from the broad scope of the secondary boycott provisions of the National Labor Relations Act. Petitioners subjected themselves to those provisions when they undertook to involve themselves in a common undertaking with statutory "labor organizations" in conduct violating Section 8(b)(4) of the National Labor Relations Act.

The Board's order will be enforced.

BAZELON, *Chief Judge,* dissenting: Eleven unions struck the Florida East Coast Railway and engaged in secondary picketing. The members of the relevant local units of these unions were all employees of the Railway. Hence, these units were not subject to regulation as "labor organizations" under the National Labor Relations Act. Seven of the eleven national unions with which these locals were affiliated, similarly, were composed entirely of railroad employees. The strike against the Florida East Coast was controlled by a council of the eleven unions, on which national and local representatives apparently participated. The actions of that council were entirely for the benefit of railroad employees in their dispute with a railroad employer. Through the fortuity that four of the participating "nationals" *are* "labor organizations" under the Act, the Board, in effect, claims the right to regulate the council's conduct of the strike.

No finding or basis for finding that the four "labor organizations" control the council appears. Absent such control, any relationship they have to the other members of the council would seem far more attenuated than was the case in *Masters, Mates & Pilots,* which involved the relationship between a local union and its parent international. More important, however, that decision does not threaten interference with a congressional allocation of regulatory responsibility. If the unions there were not subject to the National Labor Relations Board, they were subject to no regulation at all. Here, the activities of the council and its members were subject to comprehensive regulation by the Railway Labor Board, under the Railway Labor Act. For all that appears in this case, the council was formed in response to the requirements and procedures of that regulatory scheme. Congress' failure to forbid secondary boycotts under the Railway Act implies its acquiescence in such behavior by railroad employees. *Alcoa Steamship Co.* v. *Federal Maritime Comm'n,*

Nos. 18867, 18818, decided April 15, 1965, slip op. at p. 5. Before we agree that a "joint venture" has been shown, I think we must at least require the Board to determine whether the unions have been forced together by the Railway Act. Otherwise we risk interfering with the congressional scheme.

I would deny enforcement of so much of the Board's order as purports to bind agents of the four "labor organizations" and remand to the Board for further consideration of the agency issue.

APPENDIX B

[Filed July 16, 1965]

Judgment

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and a cross-petition for enforcement of, the order of the National Labor Relations Board herein, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree.

Per Curiam.

Dated: July 16, 1965

Separate dissenting opinion by Chief Judge Bazelon.

APPENDIX C

[Filed Oct. 7, 1965]

Order

On consideration of petitioners' petition for rehearing *en banc,* it is

ORDERED by the court *en banc* that petitioners' aforesaid petition is denied.

Per Curiam.

Dated: Oct. 7, 1965

Chief Judge Bazelon and Circuit Judge Wright would grant petitioners' petition for rehearing *en banc.*

Circuit Judge McGowan did not participate in the foregoing order.

APPENDIX D

The Railway Labor Act

Being An Act To provide for the prompt disposition of disputes between carriers and their employees and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

Definitions

Section 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to carrier where delivery is not beyond the tipple, and the operation of equipment or facilities therefor, or any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions

of this Act or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees ,to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act."

SEC. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier; and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees,

or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that

the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraph are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of it servcies, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or

class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The wilful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appro-

priation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

"Eleventh. Notwithstanding any other provisions of this Act, or of any ~~other~~ statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalities) uniformly re-

quired as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership

from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended."

* * * * * * * * * *

"NATIONAL MEDIATION BOARD

"SEC. 4. First. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants, employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after the approval of this Act, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term of which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business

of the Board. Each member of the Board shall receive a salary at the rate of $10,000[4] per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this Act. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

"All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board.

"A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

"Second. The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a seal which shall be judicially noticed. The Board shall make an annual report to Congress.

"Third. The Mediation Board may (1) appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and employees as are essential to the effective transaction of the work of the Board; (2) in accordance

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[4] The salaries of members changed to $15,000 per annum by Public Law 359, 81st Cong., approved October 15, 1949.

with the Classification Act of 1923,[5] fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 3, and boards of arbitration, in accordance with the provisions of this section and sections 3 and 7, respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

"Fourth. The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, any such individual member of the Board or employee designated shall have power and authority to act as to any of said work, busines, or functions so assigned or referred to him for action by the Board.

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[5] Superseded by "Classification Act of 1949 (P. L. 429, 81st Cong.) approved October 28, 1949.

"Fifth. All officers and employees of the Board of Mediation (except the members thereof whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

"All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures."

SEC. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable set-

tlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act), to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * * * * * * *

EMERGENCY BOARD

SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Pro-*

vided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the Board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 918

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. 1a–4a) is reported at 350 F. 2d 791. The decision and order of the National Labor Relations Board (J.A. 2–25) [1] are reported at 150 NLRB No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. 4a) was entered on July 16, 1965. A timely petition for re-

[1] "J.A." refers to the printed joint appendix in the court below.

hearing *en banc* was denied on October 7, 1965 (Pet. 5a). On December 28, 1965, Mr. Justice Douglas extended the time in which to file a petition for certiorari to and including January 17, 1966, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTIONS PRESENTED

1. Whether a union, whose membership consists predominantly of persons who are employees within the meaning of Section 2(3) of the National Labor Relations Act, but which also includes individuals employed by an employer subject to the Railway Labor Act, is a "labor organization" for the purposes of the National Labor Relations Act when it engages in secondary boycott activities in a dispute with an employer subject to the Railway Labor Act.

2. Whether substantial evidence supports the Board's finding that two Railway Labor unions in this case acted as agents for labor organizations subject to the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 3–4 and 6a–20a of the petition.

STATEMENT

Petitioners and five other unions are the bargaining representatives of non-operating employees working on the Florida East Coast Railway (FEC). FEC is

a common carrier subject to the Railway Labor Act; it and its employees are therefore not within the definitions of "employer" and "employee" under Sections 2(2) and 2(3) of the National Labor Relations Act.

Two of the petitioners (Order of Telegraphers and Brotherhood of Maintenance of Way Employees)[2] are composed solely of railroad workers who are not "employees" under the NLRA (J.A. 16). The remaining four petitioners (IBEW, IAM, Boilermakers and Sheet Metal Workers)[3] are International unions which, while they represent some railroad employees, principally represent "employees" of "employers" under the NLRA (J.A. 11; 47–48). The number of railroad workers within each of the Internationals varies between 4,000 and 48,000; in comparative terms, the railroad workers comprise between 2½ and 8 percent of the total membership of each International (J.A. 11; 47–48). All the members of each International vote on and participate in all union matters in the same manner (J.A. 11; 47–52).

In 1961, petitioners, along with five other unions, formed a single organization, called the Cooperating Organizations, for the purpose of presenting unified

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[2] System Division No. 87, The Order of Railroad Telegraphers (now the Transportation Communication Employees Union); Brotherhood of Maintenance of Way Employees.

[3] International Brotherhood of Electrical Workers, AFL–CIO; International Association of Machinists, AFL–CIO; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO; Sheet Metal Workers International Association, AFL–CIO.

contract demands to FEC and other railroads (J.A. 5; 31). All the railroads except FEC ultimately agreed to the terms of a new national contract, but FEC refused to be bound thereby. Separate negotiations with FEC subsequently proved unsuccessful (J.A. 5–6; 33–36).

On January 23, 1963, the Cooperating Organizations called a strike against FEC, which resulted in picketing along the FEC mainline (J.A. 6; 36–37). Each of the Cooperating Organizations participated in the strike and each furnished personnel to carry on the picketing (J.A. 14; 37). The Cooperating Organizations set up a "master strike team" to direct and coordinate all strike action (J.A. 14; 37). The master strike team in turn set up local strike teams for various geographic areas to arrange for picketing and other strike action in these local areas (J.A. 14; 37). The master strike team had final authority and control over, and was kept fully advised of, all picketing (J.A. 15; 65).

Shortly before the strike was called by the Cooperating Organizations, FEC and the National Aeronautics and Space Administration (NASA) entered into a contract pursuant to which FEC agreed to design, construct, operate, and maintain a spur line from the FEC mainline to points on and near the Merritt Island Launch Area and Cape Kennedy, Florida (J.A. 52).[4] On September 11 and 12, 1963, after work on the spur had commenced, the Cooperating Organizations

[4] The general geography of the area is shown by the map at J.A. 23.

picketed the Merritt Island area (J.A. 6; 57).[5] As a result of this picketing, employees of various contractors performing building and construction work pursuant to contracts with the United States Army Corps of Engineers refused to perform work for their employers at Merritt Island (J.A. 58).[6]

On February 10 and 11, 1964, after NASA announced that FEC would operate the newly constructed west spur, picketing was resumed at the Merritt Island Area.[7] Employees working for neutral employers and doing work unrelated to the construction or maintenance of the FEC spurs again refused to cross the picket lines (J.A. 61). On February 12, 1964, the picketing was halted by a temporary restraining order issued by a district court under Section 10(l) of the National Labor Relations Act (J.A. 7; 62). On June 8 to 10, 1964, picketing was resumed at some points and continued until again enjoined by the district court (J.A. 8; 66).

The Board found that, by their picketing at the Cape Kennedy-Merritt Island complex, petitioners had all engaged in secondary activity prohibited by

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[5] The signs carried by the pickets read (J.A. 7; 57):

Notice To The Public
F.E.C.R.R. Whose
Facilities Are Transporting
To This Project Refused To Bargain In Good Faith.
System Division No. 87, Order of Railroad Telegraphers.
We Have No Quarrel With Any Other Employer.

[6] Several of these contractors filed the unfair labor practice charges which form the basis of this proceeding.

[7] The pickets carried the same signs as in September 1963 (J.A. 7; see footnote 5, *supra*).

Section 8(b)(4)(B) of the National Labor Relations Act (J.A. 9–10; 16). As to the four Internationals (IAM, Sheet Metal Workers, and Boiler Workers), the Board found that these unions, which predominantly represented employees not subject to the Railway Labor Act, were "labor organizations" within the meaning of the National Labor Relations Act; as to the Telegraphers and Maintenance of Way Employees, which represented only railroad workers, the Board found that, while these unions were not "labor organizations" directly subject to the NLRA, they were engaged in a joint venture with, and hence were agents of, the four Internationals (J.A. 11–16). Accordingly, the Board concluded that all petitioners had violated Section 8(b)(4)(B) of the Act (J.A. 16). The Board ordered petitioners to cease and desist from the unfair labor practices found and to post appropriate notices (J.A. 18–19).

The court of appeals sustained the Board's findings and enforced its order (Pet. 1a–4a). Chief Judge Bazelon dissented as to the Telegraphers and Maintenance of Way Employees on the ground that a joint venture with the other petitioners had not adequately been shown (Pet. 3a–4a).

ARGUMENT

Section 8(b)(4)(B) of the National Labor Relations Act, under which petitioners here were charged, makes it an unfair labor practice for a "labor organization or its agents" to engage in certain secondary boycott activity. All petitioners in this case, in furtherance of a primary dispute with Florida East

Coast Railway, engaged in such prohibited secondary activity at the Merritt Island Launch Area and Cape Kennedy. Petitioners contend, however, that this activity was not an unfair labor practice under Section 8(b)(4)(B) because FEC, with whom petitioners had their primary dispute, is an employer covered by the Railway Labor Act and therefore not an "employer" under the National Labor Relations Act.

In response to this contention both the Board and the court of appeals held that the determinative question was not whether the primary employer against whom the secondary action was directed was an "employer" under the National Labor Relations Act but rather whether the unions charged with unlawful secondary activity were "labor organizations" subject to the restrictions of that Act. In our view, this decision as to the relevant criteria for the application of the NLRA was correct. Nor is there occasion for the Court to review further the factual determination that all the petitioners here were subject to the NLRA—the four Internationals as "labor organizations" and the two remaining petitioners as "agents" of such "labor organizations."

1. Section 2(5) of the National Labor Relations Act defines a labor organization as "any organization * * * in which employees participate." Under Section 2(3), an "employee" is "any employee [except] * * * any individual employed by an employer subject to the Railway Labor Act." Four of the petitioners in this case (IBEW, IAM, Boilermakers, and Sheet Metal Workers) are organizations predom-

inantly representing non-railway "employees." Under the terms of the NLRA, these petitioners were therefore "labor organizations." It is not relevant that these Internationals did not exclusively represent "employees" covered by the NLRA. As all of the courts of appeals which have had occasion to consider the question have concluded, an entity is a "labor organization" subject to the regulation of the NLRA if "employees" participate in that organization, regardless of whether they are the exclusive participants. *National Marine Engineers Beneficial Association* v. *National Labor Relations Board,* 274 F. 2d 167 (C.A. 2); *International Organization of Masters, Mates and Pilots* v. *National Labor Relations Board,* 48 LRRM 2624, enforced after remand, 351 F. 2d 771 (C.A.D.C.). See *Marine Engineers Beneficial Ass'n.* v. *Interlake Steamship Co.,* 370 U.S. 173, 184, n. 22.[8]

Section 8(b)(4)(B), moreover, contrary to petitioners' argument (Pet 9–14), clearly does not require that the primary dispute be with an "employer" sub-

[8] *Di Giorgio Fruit Corp.* v. *National Labor Relations Board,* 191 F. 2d 642 (C.A.D.C.), certiorari denied, 342 U.S. 869, is not to the contrary. The court there affirmed the Board's dismissal of the complaint against Farm Union because that union was composed *exclusively* of agricultural employees not covered by the NLRA (191 F. 2d at 644). Thus, Farm Union, unlike the four Internationals here, was not a "labor organization." Significantly the court found that National Union, the parent of Farm Union, was a labor organization within the meaning of the Act, for it did include "as members workers other than agricultural laborers"; however, the court found that there, unlike here, the evidence was insufficient to show that Farm Union had acted as its agent (*id.*, at 647–648).

ject to the NLRA in order for its prohibitions to be applicable. Section 8(b)(4)(B) prohibits specified secondary activity by a labor organization where the purpose is to require "any person" to cease doing business with "any other person"—not merely with "employers" covered by the Act. "Person" is broadly defined in Section 2(1) to include all "individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers," regardless of whether such persons are "employers" under the NLRA. Thus, the NLRA in terms does not exempt unlawful secondary activity merely because it is connected with a primary dispute with a Railway Labor Act employer. Railroads and their employees were exempted from the definitions of "employer" and "employee" under the NLRA to avoid conflicts caused by inconsistencies between the detailed provisions of the Railway Labor Act and the NLRA rules covering labor-management relations. There is no warrant for reading into the Railway Labor Act an additional implied exemption—inconsistent with the express language of the statute—for unlawful secondary conduct engaged in by a "labor organization" where the conduct concerns a primary dispute with a railroad. See *Local Union No. 25, Teamsters* v. *New York, New Haven & Hartford R.R.*, 350 U.S. 155; *W. T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5).

2. Section 8(b) applies to conduct by a "labor organization or its agents." Having found that the

four International union petitioners were "labor organizations" which had violated Section 8(b)(4)(B), the Board also found that the two remaining petitioners—Order of Telegraphers and Brotherhood of Maintenance of Way Employees—were "agents" of the Internationals (J.A. 15–16). The court of appeals affirmed this determination.

There is no occasion for further review here of the particular factual circumstances underlying this holding. The evidence fully supports the conclusion that the Telegraphers and Maintenance of Way Employees were engaged in a joint venture with the four Internationals in respect to the strike against Florida East Coast Railway and the ensuing secondary picketing.[9] Such joint venturers can properly be viewed as both principals for themselves and as agents for their coventurers. See 48 C.J.S. 827; Restatement, Torts, § 876; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249; *International Organization of Masters, Mates*

[9] As the Board pointed out (J.A. 15):

> In this case, all [Petitioners] were members of Cooperating Organizations which called and managed the strike against FEC in their common behalf. That organization, through its master and local strike teams, had final control of and authority over all the picketing. Pickets were actually placed and supervised by members of the local strike teams. Although picket signs used after September 11, 1963, carried the names of either Telegraphers or Maintenance of Way Employees as sponsor of the picketing, it is apparent, and we find, that these pickets were acting in behalf of all the striking unions and in furtherance of their common objective to win the strike against the FEC * * *.

and Pilots v. *National Labor Relations Board*, 351 F. 2d 771, 777–778 (C.A.D.C.)

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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REPLY TO BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The Brief in Opposition misdescribes the questions presented by this controversy:

1. The first question does not pertain to the "labor organization" status of the Internationals as Respondent states. Rather, the question is whether those rail-

way labor units, representing exclusively railroad employees and engaged solely in a railroad dispute in which they have complied with all provisions of the Railway Labor Act are to be subjected to the additional restrictions of the N.L.R.A. by reason of the characteristics of the Internationals.

2. The second question does not pertain to any substantial evidence issue. Rather the question is the legal one whether unions that represent only railroad employees and admittedly are not "labor organizations" under the N.L.R.A. have their rights in a dispute subject to the Railway Labor Act diminished by the N.L.R.A. on account of being associated in a common cause with other railway unions whose internationals include nonrailroad employees.

Having thus misdescribed the questions tendered for review, respondent's brief then discusses these spurious issues and fails to respond to the Petition.

Respectfully submitted,

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Motion for Leave to File and Petition for Rehearing of Order Denying Petition For Writ of Certiorari

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

(A) Motion For Leave to File Petition For Rehearing

International Brotherhood of Electrical Workers, AFL-CIO, *et al.*, respectfully move for leave to file the annexed petition for rehearing of the order of the Court denying the petition for writ of certiorari in this case, entered on March 21, 1966. Rehearing is sought because, as is pointed out more fully in the annexed petition, the issues in this case are related to the issues presented in *Brotherhood of Railway and Steamship*

Clerks v. *Florida East Coast Railway Company,* No. 750, *United States* v. *Florida East Coast Railway,* No. 782, and *Florida East Coast Railway Company* v. *United States,* No. 783, all of which have been consolidated, are pending before the Court, and are to be heard during the week of April 18, 1966.

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April 5, 1966

(B) Petition For Rehearing of Order Denying Petition For Writ of Certiorari

International Brotherhood of Electrical Workers, AFL-CIO, *et al.*, pray that the Court grant rehearing of its order of March 21, 1966, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the petition filed January 17, 1966, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. The petition for a writ of certiorari herein was filed on January 17, 1966. On January 24, 1966 the Court granted the petitions for certiorari in Nos. 750, 782, and 783, all of which, like this case, grew out of the more-than-three-year-old strike of non-operating railway employees of the Florida East Coast Railway Company, and those cases, like this case, present issues as to the appropriate function of the Federal Government in affecting the utility of the relative economic sanctions available to the respective disputants. The Federal Government, throughout the strike, has unquestionably in fact governed the effectiveness of economic sanctions, through the Railway Labor Act, the National Labor Relations Act as applied in this case, the decision under review in Nos. 750, 782, and 783, and several other rulings of lower federal courts.

2. The petitioners in No. 750 include all the petitioners in this case, as well as other striking railway unions whose rights will be determined by this case even though they were not made parties to the NLRB charges and complaint. However, under the rules and

practices of the Court governing petitions for certiorari, neither in No. 750 nor in this case was the petition for certiorari deemed by counsel for petitioners to be an appropriate vehicle for setting forth in detail the interrelationships between that case and this one and the several other cases in the lower federal courts.

The first appropriate occasion for a detailed exposition of this interrelationship was petitioners' brief on the merits in No. 750, which was filed on the same day that the order was entered denying the petition for certiorari in this case. Clearly the Court had no opportunity to consider the petition for certiorari in this case in conjunction with the brief on the merits in No. 750.

3. The brief on the merits in No. 750 does set forth at pages 21 to 27, under the heading "Companion Litigation" the interrelationships between Nos. 750, 782, and 783, this case, and other cases in the lower federal courts. That exposition, in summary, shows that the federal courts have proscribed effective picketing at both the northern and southern termini of the struck railroad, and in this case the NLRB with the approval of the Court of Appeals has also foreclosed picketing at the only other point where it might be expected to have an economic effect sufficient to induce the carrier to make any effort to settle the controversy. The unions have abided by these restrictions. On the other hand, the carrier has in the meantime, through delays in judicial proceedings, stays of injunctive orders and outright contempt of court, been able to pursue virtually without judicial hindrance its alleged "right to operate under strike conditions."

The right to withdraw from service (after all procedures and restraints of the Railway Labor Act have

been exhausted) and to picket in support of that withdrawal, are the only economic sanctions the employees have. The right to picket effectively at the southern terminus was denied for two and a half years; the right to picket effectively at the northern terminus is still denied, although we believe not permanently; unless the Court reconsiders its denial of certiorari in this case in conjunction with the alleged right of the carrier to pursue whatever course it considers expedient to operate under strike conditions the Court will have foreclosed permanently the right of employees to picket at the only other point where picketing may be expected to be effective,* as well as having determined adversely to petitioners without hearing on the merits, the important issues as to the respective functions of the Railway Labor Act and the National Labor Relations Act that have been presented in the petition for certiorari in this case.

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* The economic importance of the Cape Kennedy spur is indicated in No. 750 by the testimony of the F.E.C.'s president that traffic on the spur "has increased tremendously and * * * [is] going to increase substantially." (No. 750, R. 393, Pet. Nr. p. 23) That protection of the interests of the United States in its aeronautics and space program does not require the distorted application of the NLRA sanctioned below is also shown by the record in No. 750. (Exh. Vol. p. 460) It is there shown that a special Federal Inquiry Board appointed by President Kennedy on September 24, 1963, composed of representatives of the Department of Labor, the Department of Defense, and the National Aeronautics and Space Administration, to investigate the current and potential impact of this labor dispute on the Nation's defense and space efforts recommended "that NASA and the Air Force establish an embargo until the dispute was settled on all shipments traveling over the Florida East Coast under Government bills of lading."

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that the Court rehear the petition for certiorari in conjunction with its consideration of the merits of Nos. 750, 782, and 783 and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

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April 5, 1966

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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